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In the Supreme Court of the United States

October Term, 1982

LAKEWOOD, OHIO CONGREGATION OF
JEHOVAH'S WITNESSES, INC.

Petitioner.

VS.

CITY OF LAKEWOOD, OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT
IN OPPOSITION

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QUESTIONS PRESENTED

Whether the 1973 Zoning Ordinance of the City of Lakewood, Ohio which permits only residential uses in the single-family use districts, but allows for regional public assembly, including churches, in other residential and use districts, prohibits the free exercise of a religious belief, on its face or as applied, in violation of the First Amendment to the Constitution of the United States.

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No. 82-1769

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CONSTITUTIONAL AND STATUTORY PROVISIONS
OMITTED FROM PETITION

Ohio Constitution, Art. XVIII, Section 3:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." (Adopted September 3, 1912.)

COUNTERSTATEMENT OF THE CASE

A. Proceedings Below

The Petitioner-Corporation filed a complaint in the U.S. District Court, Northern District of Ohio, Eastern Division on October 20, 1980, alleging that the Lakewood Zoning Ordinance adopted in 1973 was unconstitutional and that it was entitled to declaratory, injunctive and damage relief pursuant to Sections 42 U.S.C. 1983 and 42 U.S.C. 1988. The case was brought to issue and a motion was made by the Respondent-City for View of the Premises, which was not opposed and granted. The case was tried to the court on July 14 through July 17, 1981, and the Court viewed the premises on August 6, 1981. The trial court filed its Memorandum Opinion and Order and its Judgment on December 1, 1981, finding the Lakewood Ordinance to be constitutional under the First, Fifth, and Fourteenth Amendments to the United States Constitution. The Petitioner-Corporation appealed from the District Court decision to the United States Court of Appeals for the Sixth Circuit, *arguing only its First Amendment claim*. The Sixth Circuit affirmed the lower court decision on February 2, 1983. *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983). The Petition for Writ of Certiorari was filed on April 28, 1983.

B. Facts

The facial constitutionality of the Lakewood Zoning Ordinance was upheld by the Common Pleas Court of Cuyahoga County, Ohio on April 17, 1978, *Lakewood, Ohio, Congregation v. Lakewood*, 9 Ohio Op. 3d 314. Such case was remanded to the trial court upon appeal in an

unreported decision for resolution of all remaining issues: essentially, the constitutionality of the 1973 zoning ordinance as applied to the specific property in question in mid-1979. The within case began with the state court case still pending.

1. *Petitioner-Corporation; Religious Activities and Beliefs*

Members of the Petitioner-Corporation established themselves as an unincorporated association in the City of Lakewood in 1944. Since March 8, 1944, members have met and worshipped at their church, Kingdom Hall, which is located at 17526 Madison Avenue in the City of Lakewood, in an apartment district somewhat distant from convenience type commercial uses. The Lakewood Kingdom Hall has a capacity of 178 persons. This property was conveyed to the Petitioner-Corporation after it was organized and incorporated under the laws of the State of Ohio on or about June 19, 1972 (Trial Stipulations 2 and 3, App.¹ 31; App. 37, 72, and 268).

Members of Petitioner-Corporation are uniformly distributed throughout the City of Lakewood; residence within the City of Lakewood is a requirement of such membership and persons living outside Lakewood must associate with another congregation. They presently number about 103 and have weekly meetings at their Kingdom Hall on Tuesday at 7:30 P.M. for bible study, on Thursday at 7:30 P.M. for theocratic school and a service meeting, and on Sunday at 10:00 A.M. for a public lecture followed by a Watchtower Study. The goal of the Petitioner-Corporation is to grow to the size of about 150-175 and then divide into two congregations, each having the same

1. "App." references are to the Joint Appendix filed with the U.S. Sixth Circuit Court of Appeals in the case below.

number of meetings utilizing the same Kingdom Hall. At some Kingdom Halls, there are three or more congregations holding the same number of meetings. In addition, members of the Petitioner-Corporation have home meetings on a weekly basis with attendance varying from eight to twenty-two. Baptisms are not conducted at the Kingdom Hall, but at a lake or coliseum (App. 239, 243, 255, 262, & 275-279).

Members of Petitioner-Corporation have no religious belief mandating location of their Kingdom Hall in a single-family residential district. In fact, Petitioner-Corporation's architect testified that a Kingdom Hall had been constructed in the mid-1970's in a Cleveland district similar to the Lakewood Madison Avenue site (See App. 220; Defendant's Exhibit K-1 through K-22; App. 73, 74). The distribution of literature on the street, house calls, and conducting in-home bible studies and training on how the bible relates to practical living in everyday life are the central tenets and missions of the Jehovah's Witnesses. Within Lakewood, such members make calls at all homes every two years (App. 238, 271-274).

2. The City of Lakewood

The City of Lakewood, a municipal corporation including territory of approximately 5.5 square miles, is an older residential community located west of the City of Cleveland, bounded by Lake Erie to the north and Rocky River to the west. The population of the City of Lakewood (69,160 in 1940; 66,154 in 1960; 70,173 in 1970; and 61,963 in 1980) increased somewhat during the 1960's due to a surge of new apartment construction, but declined during the 1970's principally due to smaller households (housing units increased 4.1% to 28,458 between 1970 and 1980).

The City of Lakewood, historically a city of homes located four to six miles from Downtown Cleveland, is almost completely developed. Although there are properties available for commercial or industrial use, just about all of the single-family lots are taken (App. 108, 163). These homes lie between, to the north of, and to the south of Madison and Detroit Avenues which run east and west across the entire breadth of the City.

3. Subject Property and Neighborhood

The property in question is a small wooded lot located at the southeast corner of Clifton and West Clifton Boulevards in the northwest sector of the City. It is surrounded by a residential neighborhood consisting of large single-family homes built over fifty years ago, for the most part. The frontage is approximately 135 feet on West Clifton Boulevard and 85 feet on Clifton Boulevard; due to curvature at the corner, the lot area is approximately 24,250 square feet. No parking is permitted on any of such frontage due to the prevailing traffic pattern in the area.

The subject property is located in a predominantly single-family (some two-family homes) residential area which is bounded by Rocky River on the west, railroad tracks to the south, Lake Erie to the north and extending east approximately one mile. To the south on the other side of the railroad tracks, in conformity with zoning, are multi-family properties, retail properties, the Lakewood Congregational Church, etc.; the railroad bridge actually divides the community leaving the single-family neighborhood, where the subject property is located, to the north, and the higher density property to the south (App. 38, 85, 93, 94, 289, & 290).

Horace Mann Junior High School, a public school, is located four or five houses south of the subject property

and Lincoln Elementary School, a public school, is located approximately one mile east of the subject property on Clifton Boulevard. These facilities are *local* places of public assembly with the primary traffic being *student-peDESTRIANS*; student assignments to both elementary and junior high schools in Lakewood are made so as to be within walking distance (App. 92, 294, and 295).

Members of Petitioner-Corporation secured an option to purchase this property some time prior to January 5, 1972, and they exercised such option and made the purchase on or about June 6, 1972, notwithstanding the denial of their application for a special exception to build a church under the 1922 zoning code of Lakewood. The exception denial was sustained by the state courts (Trial Stipulations 4 and 5; App. 32, 33).

The Lakewood Board of Zoning Appeals denied the application on January 18, 1972 because:

- “1. Letter of objection from Chief of Police Joseph McMahon. The main objection is based on the traffic problem at the intersection.
2. Twelve of the immediate property owners objected on the basis of:
 - a. Increased traffic
 - b. Possible loss of property value
 - c. Removal of property from tax duplicate
 - d. A very small part of the congregation lives within a half-mile of the location.”

On appeal the Cuyahoga County Common Pleas Court sustained the Zoning Appeals Board determination on November 27, 1972, because, *inter alia*, “. . . of traffic congestion with its incidents, hazards, and annoyances, and other reasons stated was under the substantial presence

in this case a reasonable application of the police power in behalf of the public safety and general welfare." (See Joint Exhibits E and E-1). On March 21, 1974 the Cuyahoga County Court of Appeals sustained the Trial Court decision. The Ohio Supreme Court denied certiorari on July 17, 1974.

4. Zoning and Use History

Prior to 1973, Sections 1111.02 and 1113.01 of the 1922 Lakewood Zoning Code defined the 1a residential uses applicable to the subject property (Trial Stipulation 6, Joint Exhibit F, App. 33). These sections are set forth in the Appendix to this Brief.

On July 2, 1983, the Council of the City of Lakewood adopted Ordinance No. 55-73, a completely new and comprehensive zoning code, which was later codified as Chapters 1101 through 1129 (Trial Stipulation 7, App. 33). As provided in Section 1103.01, entitled "Division into Districts", the City of Lakewood is divided into the following use districts which may be referred to by the letter and numerical designations indicated:

One Family District	R-1 District
One Family District	R-2 District
Two Family District	R-3 District
Multiple Family, Low Density	M-1 District
Multiple Family, Medium Density	M-2 District
Multiple Family, High Density	M-3 District
Business-Residential	BR District ²
Office District	B-1 District
Retail District	B-2 District
Industrial District	X District
Flood Plane	FFP District

2. BR use District established in 1976

Prior to adoption of the 1973 Zoning Code, the subject property was located in a "group 1—residence class 1a" use district with permitted uses defined by Sections 1111.02 and 1113.01; after enactment of the 1973 Code, the use district including said premises was designated R-2, limited only to buildings and premises used, established, designed, arranged, and intended for only a one-family house (Trial Stipulations 7, 10, 11; App. 33, 34). At no time were churches or other places of public assembly permitted *per se* on the subject property.

Petitioner-Corporation's expert observed at trial that the present zoning map (Joint Exhibit M or O) fairly and faithfully reflects the uses that actually exist within the City of Lakewood with the exception that there is no use district reflecting the public schools constructed prior to the 1973 Code when such construction was judicially exempt from zoning (App. 167).³

There was no testimony or evidence offered at the trial court as to the percentage of land area assigned to various use districts or as to the appropriateness of any particular proportion of land area districted to any particular use in the City of Lakewood. There is no basis for Petitioner-Corporation's assertion that churches are permitted in only ten percent (10%) of the land area of the City. Such an assertion is problematical, in any event, since a good portion of land area, possibly twenty-five percent (25%), is actually utilized for streets, schools and parks, including Rocky River Metropolitan Park, located within the territorial limits of Lakewood.

3. These facilities were installed at a time when the school board, a separate political entity, was not subject to zoning. In 1980, the law was changed by court decisions making the state and state agencies vested with eminent domain subject to zoning unless judicially excused. *Brownfield v. State*, 63 Ohio St. 2d 282 (1980) and *East Cleveland v. Board*, 69 Ohio St. 2d 23 (1982).

With reference to the zoning map in effect in 1975, when Petitioner-Corporation applied for their building permit leading to the present controversy (Joint Exhibit L, App. 321; Stipulation 15, App. 34), churches were permitted in the M-3 districts, located in the westerly portion of the City and from east to west along Madison Avenue, as well as in the B-1 and B-2 districts, located in the easterly portion of the City and from east to west along Detroit Avenue, pursuant to Sections 1115.02, 1117.02(C), and 1119.02(a) (App. 342, 350, and 351). Churches were also permitted in the M-2 medium density, multiple-family districts, located in the northeasterly and westerly sections of the City, as a special exception pursuant to Section 1113.04 (App. 340). The only requirement for granting the special exception was that no variance could be granted respecting required off-street parking. By definition, special exceptions are permitted uses and must be granted when the facts and conditions prescribed in the zoning code for the specific exception requested are found to exist by the Board of Zoning Appeals pursuant to Section 1101.30 (App. 327).

The zoning map in effect at the time of trial (Joint Exhibit M; App. 322), reflected the 1977 changes to the zoning code under which churches are permitted in Business Residential, BR, and Retail, B-2, districts provided the conditions set forth in Section 1123.14 (App. 238) are met. The B-2 district is located along the entire east-west breadth of the City on both Detroit and Madison Avenues.

At all times, the area available for church use has been substantially more than ten percent (10%). Furthermore, there are properties available for church use in Lakewood in close proximity to the single-family districts (App. 103, 123).

Historically, many churches of many different faiths are located in the City of Lakewood, primarily along Madi-

son and Detroit Avenues in close proximity to the residential areas of the City. A few churches constructed prior to the 1973 Code are scattered at various points in the City (App. 168, 169; App. 124, 125).

5. *Church and Residential Use*

Churches, although they may have been thought of as local neighborhood facilities and places walked to by their members, in modern times have become regional places of public assembly requiring considerable off-street parking, as do various other places of public assembly. The church or public assembly use involves the coming or going of large crowds with great frequency, *i.e.*, daily or several times weekly, for a multitude of purposes. The persons involved are often unassociated with the church, and, more often than not, strangers in the neighborhood where the church is located. An atmosphere of heavy traffic, noise, intrusions upon privacy, and intrusions on open spaces is created when the church is located in single-family residential neighborhoods. Church uses include church services, funerals, weddings, music, singing, choir practice, bingo games, car raffles, fish fries, bake sales, dinners, dances, sports activities, special speakers, bazaars, carnivals, rummage sales, ice cream socials, rental of places of assembly for use by outside groups, *e.g.*, Alcoholics Anonymous, Boy Scouts, Boards of Education, day care centers, special lectures, etc. (App. 147, 157, 178-184; App. 84, 92; App. 263, 264 and 266). As indicated above, Petitioner-Corporation's members assemble several times a week at their Kingdom Hall.

The single-family residence use, on the other hand, very rarely involves assembly of large numbers of persons. Gatherings of 25 persons at a home may occur once a year on the average and gatherings among three or more homes of 100 persons or more occur even less frequently, *e.g.*, a graduation party (App. 185; App. 216, 271; App. 150, 151; App. 206).

There is a limited market for the resale of a church. Churches are occasionally sold to another church or for a place of public assembly, such as a playhouse, because these are the only uses for which such buildings can be readily adapted (App. 184; App. 109, 110; App. 284). There is no religious belief of the members of Petitioner-Corporation that prevents rental or sale of their Kingdom Hall premises (App. 279).

6. Impact of Placing Church or Similar Use at Proposed Site

The neighbor to the south of the proposed site, a project engineer familiar with construction and the plans involved here, testified that the placement of the proposed structure would be no different from having a bank, movie theater, office or medical building next to his home, and that it would depreciate the value of his home in the range of twenty-five to thirty percent (25-30%); he paid \$105,000.00 for his home (App. 201-206). Homes in the neighborhood were described by Petitioner-Corporation's architect as "turn of the century homes" and "elegant".

The proposed parking spaces for the Kingdom Hall are within two feet of the easterly property line (Joint Exhibit I), and the easterly property owner's home is four feet from the property line (App. 211). Cars would be parked within six feet of the neighbor's home along its entire depth dimension and into the backyard of such easterly property. Petitioner-Corporation's own expert witnesses testified that there should be a break or barrier between the church use and surrounding residential properties by trees, bushes, or some sort of barrier (App. 189, 190), and that a parking lot directly adjacent to any single-family residential property would have a detrimental effect, causing a market value decrease (App. 211-286).

Such measures as barriers and screening would be impossible under the proposed development because parking is within two feet of one property line and within seven feet of the other property line. The lot is obviously too small for the use proposed by the Petitioner-Corporation.

The City of Lakewood is substantially built up. There is absolutely no vacant site on which to put a church in the residential neighborhoods unless there is a demolition of the existing properties. Limiting churches to the multi-family residential and other use districts, where there are plenty of locations for churches in close proximity to the residential areas, was most appropriate in the opinion of one city planner. He further indicated that constant parking of many vehicles on a residential street is something neither expected nor desirable in a residential environment. Owners of residential properties should not have to resort to tactics such as placing their own cars in the street in front of their homes so as to reserve a space for their guests (App. 123-128). With the proposed church use, 70% of the site would be devoted to buildings, parking spaces, drives and sidewalks as compared to 40% of the site area dedicated to such uses for three residential lots. Intensity of development on a site is a factor always taken into account in establishing uses and zoning regulations for a community (App. 130-133). The subject property is not large enough to accommodate the church proposed (App. 139).

Uncontroverted testimony at the trial court established that placement of a church, or any building to be used as a regional place of public assembly, at the proposed site would cause diminution in property values to the surrounding properties and the neighborhood. Such use would cause a chronic overflow parking problem in the neighborhood. The public assembly use, involving the

coming and going of large crowds in great frequency, i.e., daily or several times weekly, by persons being more often than not strangers in the neighborhood, would result in the creation of an atmosphere of heavy traffic, noise, fumes, intrusions upon privacy, and intrusions upon open spaces in the existing residential environment (App. 87-89; App. 298, 299; App. 212-216, 218; App. 153-158; App. 205-209). The overflow parking problem that would be created was well demonstrated by the examples of a local church and occasional use of the local school for PTA meetings, etc. (App. 300-305; App. 295-299).

REASONS FOR DENYING THE WRIT

Introduction

In seeking to persuade this Court to accept this case for review, Petitioner-Corporation grossly overstates and exaggerates its case.

The feature of the Lakewood zoning ordinance wherein the most frequent and heavier population density, traffic, noise, and privacy invading uses, including churches, are excluded from single-family districts and assigned to apartment and other use districts does not present an issue new or unique to the Court. In the landmark case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the zoning ordinance upheld established six districts, churches not being specified as permitted in the first two which were restricted for single-family and two-family residences, public parks, water towers and reservoirs, passenger stations, farming, nurseries and truck gardening; churches were permitted in the third class which also included apartments, hotels, and various public and community buildings. Contrary to Petitioner-Corporation's assertion, the constitutionality of the Lakewood and Euclid-

type zoning provisions has not been held in abeyance from the time of *Euclid v. Ambler Realty Co.*, *supra*. See *Corporation of Presiding Bishop v. Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *appeal dismissed for want of a substantial Federal question*, 338 U.S. 805, *reh'g denied*, 338 U.S. 939 (1950), where the very question presented here was decided by upholding the constitutionality of such an ordinance.

In the case of *Minney v. Azusa*, 164 Cal. App. 2d 12, 330 P.2d 255 (1958), *appeal dismissed*, 359 U.S. 436 (1959), also involving a Jehovah's Witnesses Congregation, the court rejected contentions and arguments based on the assertion that churches were excluded from 90% of the area of the city which were only surmised, as in the within case, by counsel from mere observations of a zoning map and without the aid of any testimony explaining and applying the facts to the entire circumstances of the city.

Petitioner-Corporation appears to intimate that there was prejudice on the part of the City respecting the 1972 proceedings (not before the Court) and passage of the comprehensive 1973 zoning ordinance and that the growth of its congregation has not expanded as a consequence. However, the 1972 decision under the old zoning code, set forth at length above, was sustained upon appeal to the Cuyahoga County Common Pleas Court, the Eighth Ohio Judicial District Court of Appeals, and the Ohio Supreme Court. In addition to the observation of Petitioner-Corporation's expert that the new zoning map fairly and faithfully reflects uses that actually exist, the District Court found in its conclusions of law as follows:

"On its face, the zoning ordinance does not discriminate against religion as a whole or against the Jehovah's Witnesses in particular. The part of the zoning ordinance listing permitted uses in R-2 districts classifies

on the basis of the use of the land and distinguishes between single-family residential use and all other uses—whether multiple-family or non-residential. The ordinance does not single out churches as an impermissible use, but disallows them along with all other institutions, secular and sacred, profit and non-profit . . . No evidence was introduced in the instant case to show that the ordinance has been applied in a manner that discriminates against churches in general or the Jehovah's Witnesses in particular . . . The congregation has not demonstrated that the purpose or effect of the R-2 zoning ordinance is to discriminate against religion or the Jehovah's Witnesses . . . The court finds that the classification is designed to control population density within the district, and is rationally related to the legitimate governmental purpose of regulating municipal growth, curtailing traffic, reducing noise, and enhancing the aesthetic properties of the area." (Op. 7, 8, 9, App. 043-045; Petition p. 18a.)

Lack of growth of a congregation which confines its membership to the 5.5 square miles of the City of Lakewood can be explained by a number of factors: e.g., the presence of many other long-established churches of many different faiths within the same City, the decline of the City's population from 70,173 to 61,963 over the last ten years, and growth and expansion of newer suburbs to the west.

1. The Court of Appeals Correctly Applied Well Established Constitutional Standards to the Facts of This Case.

It is well recognized that the attainment of a quiet place where yards are wide, the people few, and motor vehicles restricted, is a reasonable goal of land use legis-

lation and a clearly valid exercise of police power. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pritz v. Messer*, 112 Ohio St. 628 (1925); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In *Village of Belle Terre*, Justice Douglas, historically one of the most avid advocates of the First Amendment, referred to single-family districts as a "sanctuary for people", as distinguished from judicially approved bird, wildlife and other sanctuaries created for non-human creatures:

"A quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . the police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." (Emphasis added). *Id.* at 9.

The permitting of uses in a use district where they are not permitted or are otherwise inappropriate has been depicted as "spot zoning" and the taking of property rights without "due process of law". See 58 O. JUR. 2d 107, *Piece-meal, Block, or Spot Zoning*; *Willot v. Beachwood*, 175 Ohio St. 557 (1964); *Walker v. Belpre*, 14 Ohio App. 2d 17 (1967); *White v. Cincinnati*, 101 Ohio App. 160 (1956); *Clifton Hills Realty Co. v. Cincinnati*, 12 Ohio Op. 418 (1938). Although the Constitution does not explicitly mention any right of privacy, a line of decisions has recognized that a right of personal privacy does exist under the Constitution. Personal rights deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy. See *Roe v. Wade*, 410 U.S. 113, 152 (1973).

Courts have upheld as a valid exercise of police power the validity of ordinances that exclude churches from cer-

tain types of residential zones, but permit churches in other residential and use districts notwithstanding assertion of First Amendment rights. See *Presiding Bishop v. Porterville*, *supra*; *Minney v. Azusa*, *supra*; *Matthews v. Board of Supervisors*, 203 Cal. App. 2d 800, 21 Cal. Rptr. 914 (1962); *Miami Beach United Lutheran Church v. Miami Beach*, 82 So. 2d 880 (Fla. 1955); *State ex rel. Lake Drive Baptist Church v. Bayside Board of Trustees*, 12 Wis. 2d 585, 108 N.W.2d 288 (1961). This view is recognized as the correct and enlightened position to be taken by state courts. See e.g., in *State v. Cameron*, 184 N.J. Super. 66, 445 A.2d 75 (1982), where the court recognized that the Supreme Court's dismissal of *Presiding Bishop v. Porterville*, *supra*, for want of a substantial federal question was a disposition on the merits that lower courts must follow, citing *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490, 101 Sup. Ct. 2882, 2888 (1981).

In *Jewish Reconstructionist Synagogue etc. v. Roslyn Harbor*, 38 N.Y.2d 283, 379 N.Y.S.2d 747 (1975), cert. denied, 426 U.S. 950 (1976), it is actually the dissenting opinion, not the quotations relied upon by Petitioner-Corporation, that speaks for the majority of the three judge panel. The second judge concurred only in the result, and indicated agreement with the dissenting opinion that New York should approach the position taken in *Presiding Bishop v. Porterville*. *Id.* at 756-57. *Jewish Reconstructionist Synagogue*, *supra*, approved a setback variance whereby an existing building was allowed to be used as a synagogue, 106 feet away from the nearest home instead of 125 feet as required by the ordinance.

The cases cited by Petitioner-Corporation in support of their position, for the most part: were decided or based upon cases decided at an earlier time; dealt with situations where the legislature determined that churches should be permitted by special exception; included circumstances

leading to a determination that exclusion at the sites in question was unreasonable; and included *dicta* or implications to the effect that churches may not be totally excluded from residential zones. *See, e.g., State ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229 (1942). Modern customs and the advent of an explosion in the use of motor vehicles and mobility have transformed the modern church into a place of regional public assembly, however, with all the characteristics thereof and many aspects of commercialism. Modern churches attempt to use their facilities almost all of the time, seven days a week.

State courts reviewing conditional use permit or special exception cases have also affirmed the prohibition of church use in residential districts. *See Milwaukee Congregation of Jehovah's Witnesses v. Mullen*, 330 P.2d 5 (Ore. 1958), cert. denied, 359 U.S. 436 (1959); *St. James Temple v. Board of Appeals of the City of Chicago*, 100 Ill. App. 2d 302, 241 N.E.2d 525 (1968); *West Hartford Methodist Church v. Zoning Board of Appeals*, 143 Conn. 263, 121 A.2d 640 (1956); *Galfas v. Ailor*, 81 Ga. App. 13, 57 S.E.2d 834 (Ga. App., 1950). In *Milwaukee Congregation*, *supra*, the court upheld the constitutionality of a special permit to erect a church on a 100 foot by 100 foot lot in a single-family district on the grounds that the church use would create traffic congestion. The denial of the building permit did not prohibit any one of the congregation's members from exercising their religious beliefs.

In the within case we do *not* have: property including 31½ acres, 600 foot frontage by 2300 foot depth plus extra frontage as in *State ex rel. Anshe v. Bruggemeier*, 97 Ohio App. 67 (1953); a site in the vicinity of a Masonic Temple and several multi-family dwelling structures, including 300 foot frontage, a depth of 163 feet and a congregation of persons located nearby having a religious be-

lief that they must walk to their place of worship as in *Young Israel Organization of Cleveland v. Dworkin*, 105 Ohio App. 89 (1956); or a lot in close proximity to a telephone exchange building and an apartment house having space sufficient for 60 automobiles in an undeveloped community with the site having frontage on three fifty foot streets as in *State ex rel. Synod v. Joseph, supra*.

The cases on this subject, whether favoring or striking down the ordinance or conditional use permit denial, have been decided on the basis of what is reasonable under the standards set forth in *Euclid v. Ambler Realty Co., supra*. Where ordinances were held unconstitutional, the generally-stated reason given was that the absolute prohibitions sought to be upheld were found to bear no substantial relation to the public health, safety, morals, or general welfare of the community, never upon application of the theories suggested by Petitioner-Corporation. See *City of Englewood v. Apostolic Christian Church*, 146 Colo. 374, 362 P.2d 172, 175 (1961).

The free exercise of religion is infringed when a seemingly neutral state regulation forces an individual to choose between violating his religious principles and subjecting himself to a government-imposed penalty or forfeiting a governmental benefit. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963). The burden of proof is on the individual who asserts that a valid and neutral law of general applicability should not be enforced on the ground that the law prescribes (proscribes) conduct his religion proscribes (prescribes). *United States v. Lee*, U.S., 50 U.S.L.W. 4201 (1982).

At best, Petitioner-Corporation's witnesses testified about a desire to move from their present Kingdom Hall to the site in question because it would be more pleasant or aesthetically more pleasing; this desire, not a religious belief, is a desire that might be shared in common with

any individual or secular group. *See* Trial Court Opinion, pp. 27a, 28a in Appendix to Petition. Because of Petitioner-Corporation's failure to demonstrate infringement of any religious belief by reason of the Lakewood Ordinance on its face or as applied, the U.S. Sixth Circuit Court of Appeals and the Trial Court correctly determined that the remaining tests and standards prescribed by *Sherbert v. Verner, supra*, need not be applied or considered.

2. There Is No Substantial Federal Question Presented and There Are No Special or Important Reasons for Review of This Case by the United States Supreme Court.

Rule 19 of the Rules of Supreme Court of the United States provides, in part, that:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered; . . .

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

As demonstrated above, the case is not one which involves any federal question of substance which has not heretofore been decided by this Court, nor was the decision below in any way not in accord with applicable decisions of this Court. *See Euclid v. Ambler Realty Co., supra; Corporation of Presiding Bishop v. Porterville, supra; and Minney v. Azusa, supra.* In addition, there is no conflict presented here with a decision of another court of appeals or with any state or territorial law on an important state or territorial question, and there is not here involved any departure from the accepted and usual course of judicial proceedings so as to call for an exercise of the Court's power of supervision.

Petitioner-Corporation has presented no other special or important reasons for review by this Court and none exist. Indeed, the unique nature of this case weighs heavily against the issuance of the writ sought by the Petitioner-Corporation.

Petitioner-Corporation avoids the hard facts of the within case, presenting the case from a general point of view. Members of the Petitioner-Corporation have enjoyed public worship in a Kingdom Hall directly adjacent to a single-family neighborhood in Lakewood since 1944. They wish to construct a new Kingdom Hall on a lot too small in a strictly single-family district already judicially determined as being inappropriate for the proposed use. We are not dealing with a large property which would be susceptible to adequate screening, landscaping, side yard, type regulations; Petitioner-Corporation proposes parked cars two feet from the property line and six feet from the house of their easterly neighbor, violation of existing set back requirements, and an inadequate number of parking spaces calculated to cause a chronic overflow parking problem in the neighborhood (37 spaces instead of

the 49 required for a seating capacity of 195) (See App. 63 to 78).

Petitioner-Corporation has no constitutional rights or claims as a citizen or person respecting freedom of religion, except as may be asserted on behalf of its members, and the members thereof cannot claim any infringement upon the free exercise of their religious beliefs. *See Northwestern National Life Co. v. Riggs*, 203 U.S. 243 (1906); *Western Turf Assn. v. Greenberg*, 204 U.S. 359 (1907); and *NAACP v. Button*, 371 U.S. 415 (1963). Corporations obviously do not have and do not exercise religious beliefs.

Assuming arguendo that there was an infringement, the zoning ordinance in question is nothing more than a "time, place and manner" regulation and a valid exercise of the police powers of the city or the state with respect to the exercise of First Amendment rights, whether they be freedom of speech or religion. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Heffron et al. v. International Society for Krishna Consciousness, Inc.* 452 U.S. 640 (1981); *Young v. American Mini Theaters*, 427 U.S. 50 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Braunfeld v. Brown*, this Court's rejection of the appellant's argument to impose an exemption for his benefit from the "Sunday closing law" can hardly be considered as examining a proposal for a less intrusive means, as characterized by Petitioner-Corporation (Petition page 25) 366 U.S. at 608-609. The quest for such an exemption was at the heart of the *Braunfeld* case, just as it was at the heart of the *Heffron et al.* case, *supra*, and is really what the Petitioner-Corporation is after here. This quest for a special exemption, has been, and should continue to be rejected.

In *Young v. American Mini Theaters, supra*, there was no doubt that a municipality could control the location of

theaters, a First Amendment use, as well as the location of other establishments, by confining them to specified zones or requiring them to be disbursed throughout the city.

There are no logical and realistic less restrictive means for accomplishing the constitutional ends of the ordinance here examined, especially since the inquiry must take into account not only the Petitioner-Corporation and its customs and beliefs, but those of other persons and organizations that would be entitled to establish buildings in single-family residential districts in the City, not only for church purposes, but for all purposes involving public assembly for the exercise of free speech or expression of a religious belief. If the regulation is held invalid respecting Petitioner-Corporation, how could it be held valid as to the establishment of places of public assembly in single-family districts by other social, political, religious or charitable organizations. Counsel for the Petitioner-Corporation agrees that the same constitutional principles are to be applied to *all rights* guaranteed under the First Amendment. *See also Heffron v. International Society for Krishna Consciousness, supra*, 450 U.S. at 653. Means such as penalizing disorder or disruption, commercial uses, etc. by regulation will not adequately deal with the problems posed and in fact might constitute means more intrusive, e.g., regulating the times and purposes for which church associations shall meet.

The facts which make up the within record, in an event, are in many respects unique and, for the reasons stated, are not general as suggested by the Petitioner-Corporation. Review of this case would, therefore, be limited and turn on the specific factual considerations presented herein and would have little, if any, general application or impact.

CONCLUSION

In conclusion, Respondent respectfully submits that the Writ of Certiorari prayed for in this action should be denied, because:

- (1) No substantial federal question for resolution is presented in this action;
- (2) The decision below rests in large part on long established law found in the decisions of this Court;
- (3) The decision below turns upon facts so unique that any decision of this Court would have little precedential value.

Respectfully submitted,

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APPENDIX

CITY OF LAKEWOOD 1922 ZONING CODE PROVISIONS

1111.02 Group 1—Residence Classes; Class 1a Uses, Dwelling.

- (1) Dwelling.
- (2) Church, school, public library, public museum.
- (3) Community center building, private club, except a club the chief activity of which is a service carried on as a business, philanthropic or eleemosynary use or institution other than a penal or correctional institution. (Ord. 4795. Passed 1-7-52).
- (4) All public buildings or premises and public use of buildings or premises excepting as provisions specifically applicable thereto are otherwise made in this chapter. (Ord. 17-55. Passed 3-7-55).
- (5) Railway passenger station, railway right-of-way, not including railway yards.
- (6) Farming, greenhouse, nursery, truck gardening. (Ord. 4795. Passed 1-7-52).

1113.02 Dwelling.

In a class 1a district no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used for a class 1a, 2a, 3a, 3b and 3c use. In a class 1a district no building shall be erected which is arranged, intended or designed to be used, except for a class 1a use. In a class 1a district no building shall be erected which is arranged, intended or designed

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for a use enumerated in subdivision (2) or (3) of class 1a uses, unless such building is located:

- (1) On a lot already devoted to a use enumerated in said subdivision.
- (2) On a lot fronting on a portion of a street between two intersecting streets in which portion there exists a building of a kind enumerated in said subdivisions.
- (3) On a lot immediately adjacent to or across the street from a public park or public playground.
- (4) On a lot fronting a street having street car tracks therein opposite such lot.
- (5) On a lot fronting on a portion of a street between two intersecting streets in which portion there exists a building devoted to a non-conforming use.
- (6) On a lot immediately adjoining or immediately opposite on the other side of the street from a 2a, 2b, 3a or 3b district; or
- (7) On a lot approved after public notice and hearing by the Board of Zoning Appeals. (Ord. 1786. Passed 2/13/22).